STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 5046, Complainant, v. ELKO COUNTY FIRE PROTECTION DISTRICT, Respondent.	Case No. 2019-011 **ORDER** **PANEL E** **ITEM NO. 847-A**

On May 27, 2020, this matter came before the State of Nevada, Government Employee-Management Relations Board ("Board") for consideration and decision pursuant to the provisions of NRS Chapter 288, the Government Employee-Management Relations Act ("EMRA"); NAC Chapter 288 and NRS Chapter 233B.

In its Complaint, Complainant alleges that Respondent engaged in a violation of the duty to bargain in good faith during negotiations of the CBA and failed to comply with Respondent's requests for information made pursuant to NRS 288.180.

As background to the negotiations, prior to January 1, 2015, Elko County relied on the Nevada Department of Forestry (NDF) for fire suppression activities in the County. However, in 2014, after the Legislature determined it would no longer provide all risk services, the Board of County Commissioners voted to create a fire suppression district pursuant to NRS Chapter 474. On January 1, 2015, Respondent began its operations as an independent district, separate from the County. Respondent operates its own budget and provides risk services for the County. Initially, Respondent was funded out of the County General Fund. However, beginning in July 2018, the County Commissioners voted to remove Respondent from its General Fund, establishing it as a regular tax district funded by a distinct Fire District tax source that cannot be combined with County funds.

Both Respondent and the County lacked sufficient resources to manage wildland fire suppression activities in the County. As such, Respondent participates in the Wildland Fire Protection Program (WFPP) managed by NDF. Prior to FY 2018-2019, NDF did not use a formula to determine membership costs associated with participation in the WFPP. Instead, NDF required Respondent to pay a $400,000.00 participation fee. However, for FY 2019-2020, NDF created a formula that it would use to determine and assign participation costs to the members. NDF informed its membership of its decision to apply a cost formula at a meeting held in February 2019 and invited its members to participate in a meeting to discuss the application of the formula. At that time, NDF informed Respondent that it would likely expect its participation fees to increase to somewhere around $990,000.00 annually. Prior to the February meeting, Respondent was not aware that NDF intended to raise its participation fee for the following fiscal year.

In response, NDF initiated a meeting in March 2019. At this meeting, NDF explained its new fee calculation formula to its membership. Thereafter, NDF informed Respondent that its participation fee for FY 2019-2020 would be increasing to roughly over a million dollars annually. Respondent then approached NDF to try to negotiate a lower participation fee which continued into May. Respondent and NDF settled on a fee of $600,000.00 for the 2019-2020 fiscal year.

The negotiations for the FY 2019-2020 CBA between the parties were also occurring during this time with this background in mind. In January 2019, the parties scheduled their first two negotiations session for March 13, 2019 and March 25, 2019. On March 13, 2019, the parties engaged in the first meeting related to negotiations for FY 2019- 2020. At the March 13th meeting, the parties negotiated their Ground Rules for the negotiations.

In addition, Complainant presented several initial proposals for amendments to the CBA. Although Respondent reviewed the proposals, Respondent did not issue a counterproposal at that meeting. Instead, Respondent informed Complainant that it was not ready to negotiate on matters with a fiscal impact because it was too early in the budgeting process, and Respondent needed more time to understand its financial position for the following year (pursuant to NRS 354, local governments must submit tentative budgets by April 15th and final budgets must be adopted by June 1st). The meeting came to an end by mutual agreement of the parties.

As early as March 2019, Respondent indicated it would negotiate on matters that did not have a fiscal impact while it waited for confirmation on its budgetary status. However, Complainant asserted they had none.

On March 21, 2019, Respondent emailed Complainant to request the next meeting, scheduled for March 25, 2019, be rescheduled. Respondent also requested the third meeting, tentatively scheduled for April 8th, be rescheduled as their counsel and chief negotiator received a jury summons that required her appearance on April 8th. Complainant informed that they would not agree to reschedule the March 25th meeting. On March 22nd, Respondent emailed again requesting to cancel the March 25th meeting reiterating that Respondent was not yet able to negotiate on matters with a fiscal impact as it was waiting for the completion of its budgeting process. Respondent recommended the meeting be rescheduled for early June due the number of scheduling conflicts previously expressed by the parties during the March 13th meeting and in consideration of Respondent's wish to better understand any legislative changes that may occur during the 2019 Legislative Session. In response, on March 25th, Complainant demanded that the next bargaining session be scheduled for April 12th alleging that Respondent was needlessly delaying negotiations. On March 27th, Respondent asserted it was not trying to needlessly delay negotiations, but instead, was simply asking to effectively postpone further negotiations until Respondent had a better understanding of its budget. Respondent stated the intent was to have negotiations be as productive as possible, specifically it would be a better use of time and resources to wait until Respondent was practically able to negotiate on matters with a fiscal impact. Respondent also indicated it was not available on April 12th.

On April 2nd, Complainant requested Respondent's dates of availability so the parties could schedule the next session. Respondent proposed several dates for early June (again reiterating that Respondent believed setting dates before June would be fruitless and wasteful). On May 10th, Complainant emailed Respondent to determine whether Respondent would be available to meet on June 13th or 20th. Respondent responded that day indicating availability on the 13th which was then confirmed by Complainant. Complainant filed its prohibited practices complaint with this Board on May 17th.

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On June 13th, the parties met for their second negotiation session. At this meeting, Respondent submitted its declaration of inability to pay for any financial changes to the CBA, and Complainant declared impasse. In September 2019, the parties engaged in fact finding pursuant to NRS 288.200. Respondent did not agree to accept the Fact Finder's Recommendation. In December 2019, the parties engaged in post-impasse negotiations. Pursuant to NRS 288.215, the parties engaged an arbitrator to oversee interest arbitration, scheduled for April 30th and May 1st, which has been purportedly delayed due to the health crisis.

During the time period above, Complaint submitted requests for information to Respondent. On March 20, 2019, Complainant submitted such a request to Respondent. The next day, on March 21st, Respondent confirmed receipt and informed that Respondent would not be able to produce the requested information by March 25th, the date requested by Complainant. Respondent indicated they could not produce what was requested before April 12th. In response, Complainant stated it required the production before April 5th.

Respondent was unable to complete its responses to the RFI by April 12th. While working on its production of documents for the March 20th RFI, Respondent received a second RFI from Complaint on April 30th. On May 10th, Complainant sent an email demanding all the production of information by the next Friday. On May 15th, the response to Complainant's RFI related to District Volunteer Firefighters was finalized. On May 17th, Respondent issued its response to both RFIs. Included in this response was a thumb drive containing the requested information.

On June 12th, Complainant informed Respondent that the information requested in the March 20th and April 30th RFIs had not been included on the thumb drive. This information was provided the next day, on June 13th.

DISCUSSION

The Act imposes a reciprocal duty on employers and bargaining agents to negotiate in good faith concerning the mandatory subjects of bargaining listed in NRS 288.150. *Juvenile Justice Supr. Ass'n v. County of Clark*, Case No. 2017-20, Item No. 834 (2018); *Nevada Classified Sch. Employees Ass'n Ch. 5, Nevada AFT v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020). It is a prohibited practice for a local government employer willfully to refuse to bargain collectively in

good faith with the exclusive representative as required in NRS 288.150. NRS 288.270(1)(e); *O'Leary v. Las Vegas Metropolitan Police Dep't*, Item No. 803, EMRB Case No. A1-046116 (2015); *see also Serv. Employees Int'l Union, Local 1107 v. Clark County*, Item No. 713A, EMRB Case No. A1-045965 (2010).

"A party's conduct at the bargaining table must evidence a sincere desire to come to an agreement. The determination of whether there has been such sincerity is made by drawing inferences from conduct of the parties as a whole." *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, Item No. 253-A (1991), *quoting NLRB v. Ins. Agent's Int'l Union*, 361 U.S. 488 (1970). The duty to bargain in good faith does not require that the parties actually reach an agreement but does require that the parties approach negotiations with a sincere effort to do so. *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, Item No. 253-A, Case No. A1-045472 (1991). "In order to show 'bad faith', a complainant must present 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Juvenile Justice Supr. Ass'n v. County of Clark*, Case No. 2017-20 (2018); *Boland v. Nevada Serv. Employees Union*, Item No. 802, at 5 (2015), *quoting Amalgamated Ass'n of St., Elec. Ry. And Motor Coach Emp. of America v. Lockridge*, 403 U.S. 274, 301 (1971); *Las Vegas Peace Officers Ass'n v. City of Las Vegas*, Case No. 2015-034, Item Nos. 821, 821-A (2018). Adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining. *Reno Municipal Employees Ass'n v. City of Reno*, Item No. 93 (1980); *City of Reno v. Reno Police Protective Ass'n*, Case No. A1-046096, Item No. 790 (2013) (bad faith bargaining "does not turn on a single isolated incident; but rather the Board looks at the totality of conduct throughout negotiations to determine 'whether a party's conduct at the bargaining table evidences a real desire to come into agreement."), *citing Int'l Brotherhood of Electrical Workers, Local 1245 v. City of Fallon*, Item No. 269, Case No. A1-045485 (1991).

Based on the facts of this case, the parties conduct as a whole, and the totality of the circumstances, the Board finds that Respondent did not engage in bad faith bargaining.

In March, after it had already scheduled the first two negotiation sessions, Respondent received notice from NDF that its WFPP participation fee would nearly triple. Respondent reasonably needed time to negotiate with NDF. Respondent continued with the first meeting to notify Complainant of budgetary concerns in hopes of handling any issues unrelated to fiscal matters, of which Complainant

informed there were none. Testimony was credibly presented that Respondent sincerely wished to reach an agreement and was simply attempting to do so as practicably as possible with the information and situation before it.

As indicated, adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining. *Reno Municipal Employees Ass'n v. City of Reno*, Item No. 93 (1980). "In order to show 'bad faith', a complainant must present 'substantial evidence of fraud, deceitful action or dishonest conduct.'" *Boland*, Item No. 802, at 5, *quoting Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America*, 403 U.S. at 301. Based on the conduct of the parties as a whole, Complainant's argument is not well taken. Complainant failed to show bad faith and "present 'substantial evidence of fraud, deceitful action or dishonest conduct.'' The Board finds that Respondent's delays here do not amount to a prohibited practice based on the facts of this case.

Complainant points to Respondent's decision to unilaterally cancel the March 25th meeting which it claims violated the Ground Rules.[1] The Ground Rules provide: "Negotiations sessions may be cancelled with 48 hours notice to the other chief negotiators. Cancelled sessions will be rescheduled to be held within 5 working days of the cancelled session; or as soon as practicable and with the agreement of both chief negotiators." We generally assign common or normal meanings to words in a contract. *Ebarb v. Clark County*, Case No. 2018-006 (2019), *citing* Am. *First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015); *Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983); *Nevada Classified Sch. Employees Ass'n Ch. 5, Nevada AFT v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020). Furthermore, "[a] court should not interpret a contract so as to make meaningless its provisions," and "[e]very word must be given effect if at all possible.'" *Mendenhall v. Tassinari*, 403 P.3d 364, 373 (2017); *see also Yu v. Las*

[1] The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed. This is well established. *Nevada Classified Sch. Employees Ass'n Ch. 5, Nevada AFT v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020); *Jackson v. Clark County*, Case no. 2018-007, Item No. 837 (2019); *Boykin v. City of N. Las Vegas Police Dept.*, Item No. 674E, Case No. A1-045921 (2010), *citing NLRB v. Strong Roofing & Ins. Co.*, 393 U.S. 357 (1969), *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967); *N.L.R.B. v. Ne. Oklahoma City Mfg. Co.*, 631 F.2d 669, 675 (10th Cir. 1980); *Jim Walter Resources*, 289 NLRB 1441, 1449 (1988); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. Las Vegas Metropolitan Dep't*, Case No. 2017-025, Item No. 829 (2018); *Int'l Ass'n of Fire Fighters, Local 4068 v. Town of Pahrump*, Case No. 2017-009 (2018).

Vegas Metropolitan Police Dep't, Case No. 2017-025 (2018); *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) ("[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract.").

Preliminarily, there is no dispute that Respondent gave proper notice to cancel the meeting. Instead, the dispute surrounds the failure to reschedule the meeting to be held within 5 working days of the cancelled meeting.

Respondent argued for the interpretation that the Ground Rules do not require the parties to reschedule within 5 days and, instead, the plain language of the Rules give the parties the option of scheduling within 5 days or as soon as practicable, as agreed by the chief negotiators. Complainant seemed to maintain the Ground Rules require Complainant's consent otherwise the meeting must be rescheduled to be held within 5 days. *See* Complainant's Closing Brief, at 3.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007). "A contract is ambiguous when it is subject to more than one reasonable interpretation." *Id.*

Here, the contract is ambiguous as both parties' interpretations are reasonable. While the phrases are separated by a semicolon, this is generally not determinative. *See also Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. Adv. Op. 9, 412 P.3d 56, 60 (2018) (noting that "the dissent's statutory analysis … emphasizes rules of statutory construction involving grammar and punctuation use that are generally resorted to only when they can be employed consistently with the legislative intent"); *see also* 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes & Statutory Construction § 21.15 (7th ed. 2009) (stating that grammar and punctuation use are statutory interpretation aids, but 'neither is controlling unless the result is in harmony with the clearly expressed intent of the Legislature,' and acknowledging that '[c]ourts have indicated that punctuation will not be given much consideration in interpretation because it often represents the stylistic preferences of the printer or proofreader instead of the considered judgment of the drafter or legislator'".). In other words, "and with the agreement of both chief negotiators" could apply to both clauses and signify that that the chief negotiators must agree on a date and one cannot be unilaterally set. *See also State v. Brodigan*, 34 Nev. 486, 125 P. 699, 701

(1912); *Ex parte Skaug*, 63 Nev. 101, 115, 164 P.2d 743, 749 (1945).

Complainant's urged reading could also result in a harsh and unreasonable contract against Nevada Supreme Court directives. For example, scheduling conflicts, injuries, or other unforeseen circumstances could prevent strict rescheduling of negotiations to be held within 5 working days as the testimony from the hearing established.

Furthermore, the intent of the parties supports Respondent's interpretation. Respondent credibly presented testimony that this rule had previously not been interpreted as requiring a canceled meeting to be held within five days of a canceled sessions. *See, e.g.*, *Jackson v. Clark County*, Case no. 2018-007, Item No. 837 (2019); *Douglas County. Support Staff Org. v. Douglas County Sch. Dist.*, Case No. A1-046105, Item No. 797 (2014); *Nevada Classified Sch. Employees Ass'n Ch. 5, Nevada AFT v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020). The credible testimony made clear that the subject language is routinely included in ground rules, and neither Elko nor the District ever interpreted this rule as absolutely requiring a canceled meeting to be rescheduled to be held within 5 days unless both negotiators agree otherwise. Amanda Osborne, who regularly participates in negotiations on behalf of the County and District, indicated the Ground Rules at issue were standard and she interpreted it as rescheduling within 5 working days or as soon as they are able to. Osborne explained that it's not common to schedule cancelled meetings within 5 days as "schedules are pretty difficult to coordinate with that sort of notice". Patrick Linstruth, officer in Local 5046, stated that "if [the parties could] not" hold another session within five days, the parties were able to reschedule "as soon as practicable with the agreement of both negotiators or another date that both parties agree to." So while counsel for Complainant had Linstruth clarify, that cancelled session be rescheduled within 5 days, Linstruth initially had a broader reading. In contrast, Complainant failed to present credible evidence that absolutely required the meeting to be rescheduled within 5 working unless both parties agreed otherwise. *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) ("The best approach for interpreting an ambiguous contract is to delve beyond its express terms and 'examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties.'").

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However, as the Board further explains below, Respondent's delays here teetered on the line of bad faith bargaining. Even if Respondent's reading is correct, Respondent was still required per the terms of the contract to schedule as soon as practicable. While the Board was credibly presented with evidence (as detailed below) that scheduling conflicts, unforeseen budgeting matters, as well as discussions about responses to RFI as well as production related thereto may have justified the delays, the Board cautions that further delays in this matter would most likely have resulted in a bad faith determination. "Practicable" is simply defined as "capable of being done, effected, or put into practice, with the available means; feasible (*i.e.* 'a practicable solution')." Dictionary.com (2020). As such, "as soon as practicable" could have considered the above and indeed Respondent outwardly maintained the position that they were trying to approach negotiations as practicable as possible.

Regardless, **and more importantly**, even if Complainant's interpretation were correct, Complainant failed to present substantial evidence of fraud, deceitful action or other dishonest conduct by Respondent as further explained below. In other words, **the Board would still have not found bad faith bargaining in this case even if Respondent was required to have the next meeting be held within 5 working days**. Simply a failure to reschedule meetings within 5 working days, in connection with the conduct of the parties as a whole, does not lead this Board to find bad faith bargaining. Moreover, the logical end to Complainant's argument is that this Board would essentially be required to find bad faith bargaining simply because one party refused to allow a session to be rescheduled greater than within 5 working without taking into consideration the totality of the circumstances or the parties conduct as a whole. This would be in direct contravention to the established methods for determining bad faith bargaining by this Board and persuasive NLRB precedent. In other words, any breach of a contractual provision (which the Board does not have jurisdiction over[2]) does not necessarily, in it of

[2] The Board's authority is limited to matters arising out of the interpretation of, or performance under, the provisions of the EMRA. NRS 288.110(2). The Board does not have the jurisdiction to find a breach of contract. This is expressly beyond the Board's jurisdiction, which is well established. *See* NRS 288.110(2); *City of Reno v. Reno Police Protective Ass'n*, 98 Nev. 472, 474–75, 653 P.2d 156, 158 (1982); *UMC Physicians Bargaining Unit v. Nevada Serv. Employees Union,* 124 Nev. 84, 89-90, 178 P.3d 709, 713 (2008); *City of Henderson v. Kilgore*, 122 Nev. 331, 333, 131 P.3d 11, 12 (2006); *Int'l Ass'n of Fire Fighters, Local 1908 v. County of Clark*, Case No. A1-046120, Item No. 811 (2015); *Simo v. City of Henderson*, Case No. A1-04611, Item No. 796 (2014); *see e.g., Flores v. Clark Cty.*, Case No. A1-045990, Item No. 737 (2010); *Bonner v. City of N. Las Vegas*, Case No. 2015-027 (2017), *aff'd*, Docket No. 76408, 2020 WL 3571914, at 2, filed June 30, 2020, unpublished deposition (Nev.

itself, lead to a prohibited labor practice. *See, e.g.*, *Jackson v. Clark County*, Case no. 2018-007, Item No. 837 (2019); *Nevada Classified Sch. Employees Ass'n Ch. 5, Nevada AFT v. Churchill County Sch. Dist.*, Case No. 2020-008, Item No. 863 (2020). Indeed, based on the facts of this case and the totality of the circumstances, the Board cannot find Respondent engaged in the prohibited practice of bad faith bargaining. Respondents' witnesses were credible that they were not trying to needlessly delay negotiations and were doing everything in their power to comply.

The parties met on March 13th (agreeing on the Ground Rules with Complainant providing initial proposals). On March 22nd, Respondent cancelled the March 25th bargaining session requesting to "hold off" the next meeting until after June 6th as only fiscal matters were in play and with the above background in mind. Complainant made it clear that they would not wait roughly two months for the next session. Respondent then attempted to reason with Complainant that meeting would not be productive until Respondent could negotiate on fiscal matters and Respondent determined whether it could pay for the proposals. Indeed, Respondent was in a perilous situation with new fees from the NDF that Respondent credibly provided were unforeseeable and could have led to a fiscal emergency and reductions in force. It only took Respondent until May to settle on a lower fee with NDF. Moreover, as testimony also credibly established, there were scheduling conflicts that only lead to slight delays here. In March, Respondent provided several dates for June with the parties eventually agreeing to June 13th (the parties had several discussions prior thereto related to the response to the RFIs). The parties indeed met on June 13th with Complainant declaring impasse and thereafter the parties engaged in fact finding, post-impasse negotiations, and have engaged an arbitrator to oversee interest arbitration. While Complainant argues Respondent did nothing, instead declaring an inability to pay to increases, Complainant assumes that nothing went into this determination. The Board was not presented with credible testimony establishing that Respondent did so without a sufficient basis.

Thus, Complainant would have this Board order that Respondent engaged in bad faith bargaining because of a roughly 2-month reasonable delay from the cancelled meeting on March 25th until June 13th. *See also infra* note 5 and accompanying text. As indicated above, the Board will not

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2020); *Kerns v. LVMPD*, Case No. 2017-010 (2018); *Yu v. LVMPD*, Case No. 2017-025, Item No. 829 (2018). *But see supra* note 1.

so find based on the facts of this case including the parties' conduct as whole and totality of the circumstances.

In support of its position, Complainant cites to the 1977 Florida District Court of Appeals in which the Florida Public Employees Relations Commission (PERC) found certain unfair labor practices. *Pasco Cty. Sch. Bd. v. Fla. Pub. Employees Relations Comm'n*, 353 So. 2d 108, 113 (Fla. Dist. Ct. App. 1977). However, in this case, PERC found that *a unilateral change* had been committed by "not during a bargaining session, the Board, following the recommendations of the superintendent, adopted a 1975-76 salary schedule for all Board employees, including a 5% cut in salaries, a 5% cut in supplements, a freeze on increments and a change in the school calendar which eliminated pre-school planning days." *Id.* at 123. In contrast, there has been no allegation of a unilateral change in this case.

Moreover, PERC noted that the regulations which required either a reduction in salaries or to pay "had been in effect for some time prior to the June 3rd meeting and the Board was not suddenly confronted with the prospect that its operating budget for the next succeeding year might be less than the preceding year". *Id.* However, as indicated, Respondent was faced with an unprecedent change that may have led to layoffs. While Respondent in theory could have simply declared an inability to pay at that time (though as indicated below, Respondent was not certain initially that it actually had an inability to pay), Respondent reasonably attempted to find a solution so it could perhaps pay for increases. Simply because that did not come to fruition does not translate into bad faith bargaining in this case based on the conduct of the parties as a whole and the totality of the circumstances. Indeed, in this case, there was simply a roughly 2-month delay from the cancelled meeting. Respondent was also preparing voluminous responses to Complainant's RFIs and, as also further detailed below, Respondent genuinely believed negotiations would be more practicable once the responses were completed (as also explained, Complainant was performing its own analysis of Respondent's ability to pay based on the response to the RFIs).

Furthermore, while the District Court of Appeals of Florida generally stated the "expressed reason for not bargaining on the ground of its uncertain fiscal future cannot be excused" that statement must not be read in isolation but in context of the entire case. In addition, the District Court of Appeals of Florida cited, in support of this proposition, to the United States Supreme Court case of *NLRB v.*

American National Insurance Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952). *Id.* at 124. In that case, the United States Supreme Court explained: "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *N.L.R.B. v. Am. Nat. Ins. Co.*, 343 U.S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027 (1952). This is exactly was Respondent did in this case (*i.e.*, sought to avoid fruitless marathon discussions by instead providing frank statements of their position).

The District Court of Appeals of Florida clarified the reasoning of the decision: "The Board finally made a counter-offer on July 3, 1975, offering a 3% reduction as a temporary salary schedule. The Board could have easily made a tentative counterproposal *before it initiated the cuts* on June 3, 1975, in the very midst of bargaining." *Pasco Cty. Sch. Bd.*, 353 So. 2d at 125 (*emphasis* added). Again, there have been no allegations of unilateral changes here. Indeed, the District Court of Appeals of Florida liken the matter of *NLRB v. Hondo Drilling Co., N.S.L.*, 525 F.2d 864 (*emphasis* added) (5th Cir. 1976) ("a similar claim by an employer, an oil drilling company, that it was necessary to institute *a unilateral action* involving wage increases, holidays, vacations, etc., because of the urgency of the circumstances surrounding it") and distinguished *NLRB v. Minute Maid Corporation*, 283 F.2d 705 (*emphasis* added) (5th Cir. 1960) (holding "the employer was not guilty of a failure to bargain collectively … [as it] *excused Minute Maid from bargaining on economic matters when, at that time, the employer had no knowledge of the extent of the freeze damage*").

Complainant also cited to the Court of Appeals of Arizona case of *City of Phoenix v. Phoenix Employment Relations Bd. ex rel. Am. Fed'n of State, Cty. & Mun. Employees Ass'n, Local 2384*, 145 Ariz. 92, 96, 699 P.2d 1323, 1327 (Ct. App. 1985). However, in that case, the Court explained: "In *Pease*, the administrative law judge found that all issues were discussed between the parties and principal issues were discussed at length. The contrary is true in this case." "The trial court found that there was substantial evidence to support PERB's findings that the City's '[a]dherence to the position that ... the resultant guidelines were mandatory precluded the honest give-and-take of bargaining which could consider all of the rationale and arguments of the employee organizations participating in the meet and confer process.'" The Court of Appeal of Arizona noted: "Although one party to the collective negotiating process may adhere to a position throughout the negotiations, that party must

nevertheless submit the issue to negotiation and engage in a full exchange of communication pertaining to its position. '[R]efusals to discuss mandatory subjects of bargaining run afoul of [collective] bargaining requirements.'" *Id.* Indeed, here, there was no refusal to discuss mandatory subjects of bargaining, and there was no credible evidence presented that Respondent did not "engage in a full exchange of communication pertaining to its position." Respondent made its position known including the hope to obtain a better understanding of its budgeting process and wished to agree to a short postponement so it could hopefully pay for increases. *See also Discussion infra* regarding Requests for Information (RFIs).

Complainant asked for "a list of pending legislative bills and an explanation as to how they affect the District's negotiations". Respondent agreed to provide this with its response to the RFIs (see below). Moreover, Complainant did not request specifics regarding the budgeting process (see above and below). More importantly, this is all in the context of a roughly 2-month delay. Linstruth testified that Respondent was specifically informed of the NDF changes at their second meeting in June (also indicating that the information was on the thumb drive but he only "glanced at a couple of them" a day or two after receipt on May 20th). While the Board agrees that perhaps it would have been helpful for Respondent to specifically explain the circumstances surrounding their budget, Respondent did not resolve that issue until May (as such a tentative budget being due on April 15th is not determinative and the final budget documents were not due until June). Bingaman also credibly testified regarding the substantial difference between the tentative and final budget.

More importantly, Complainant failed to "present 'substantial evidence of fraud, deceitful action or dishonest conduct.'' *See, e.g. Ed. Support Employees Ass'n v. Clark County Sch. Dist.*, Case No. A1-046113, Item No. 809, at 6 ("According to the Association, it was kept in the dark about the contemplated plan changes and premium increases that were being discussed, thus preventing it from meaningful bargaining ... "[t]he District did not volunteer the information about its negotiations ..., but the Board saw no evidence that the District actively misled or deceived the Association about these negotiations.").

Here, the Board saw no evidence that Respondent actively misled or deceived Complainant about the impacts of their budget. Indeed, no credible evidence was presented by Complainant that it

requested specifics into the Respondent's budgeting process and Respondent misled or deceived Complainant. As indicated, on March 25th, Complainant solely requested "a list of all pending legislative bills … and an explanation as to how they supposedly prevent the district from proceeding with the instant negotiations." Respondent responded (in two days) that it was not attempting to needlessly delay and was simply doing so to understand their budget to assist in negotiation of matters with a fiscal impact. Respondent also stated: "Further, at no point has the District alleged that a bill or set of bills prevent the District from proceeding with negotiations. The District has simply asserted that it would be more fruitful, and thus a better use of time and resources; in its opinion, if negotiations on matters that have a fiscal impact were postponed until the District has a better idea about where certain legislation is going."

Respondent agreed to provide Complainant with a copy of the bill Respondent was concerned with included with its responses to the rest of Complainant's RFI. Complainant did not object to Respondent including it in its responses. Respondent again proposed early June for the next meeting. Complainant responded that he believed she had no intention of attending the March 25th session, though the Board was not provided credible evidence that this was indeed the case when they originally agreed to this date. Complainant also responded requesting a date for the month of April and indicating his hopes that "the district is financially prudent enough to include them in its tentative budget". On April 2nd, Respondent indicated that she apologized for any misunderstanding of the next meeting, and that Respondent was not open to meeting until after June 6th (after the close of the legislative session) as it earnestly believed it would be both fruitless and wasteful. Respondent reiterated that at this point it did not know if it could actually pay for increases. Complainant then stated that "it is not Local 5046's fault that you and the district's administration are incapable of completing the budgeting process properly and formulating appropriate counter-proposals." Respondent stated that they were complying with the Ground Rules as they were "seeking to reschedule the canceled meeting as soon as practicable, and [they were] actively preparing the documents requested by IAFF."

Complainant then responded (April 15th), that it didn't receive the responses to the RFI. Respondent responded (the next day) that responses were not issued on April 12th as planned due to a personal conflict (*see also* Discussion *infra* regarding RFIs). Complainant responded (April 30th),

inquiring as to the status of the first RFI and requested a second RFI "to complete an analysis of the district's finances". Thus, Complainant was making its own analysis of Respondent's budget. On May 7th, Complainant requested an update. Within two days (on May 9th), Respondent replied that she apologized for the delay and was out of the office due to a seminar as well as providing an update that they were diligently gathering the information requested and would send their response with the information as soon as they could. At that point (May 10th), Complainant requested June 13th or the 20th for the next session. Respondent replied the same day agreeing to the 13th (as such, Respondent could have delayed another week by agreeing to the 20th).

Complainant also seems to imply that the factfinder's determination that Respondent had the ability to pay monetary benefits is determinative; however, Minor testified that he disagreed with the factfinder's report (the Board also notes it does not have jurisdiction over NRS 474). The subsequent findings of the factfinder are not determinative in regard to the determination of whether there had been bad faith bargaining prior thereto.[3] Additionally, adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining. In other words, just because Respondent may have theoretically been able to pay increases (as subsequently found by the factfinder) does not necessarily mean it required Respondent to do so – Complainant provided the Board nothing to the contrary. *See* NRS 288.150 (*only* the "right to reduce in force or lay off" is predicated on a "lack of money", not a requirement for increases). Moreover, the Board has not held that the act of declaring an inability to pay amounts to bad faith bargaining. Complainant's main contention (*see* Complainant's Closing Brief, 13) is essentially Respondent should have declared its inability to pay initially and not waited three months to do so. However, as indicated above, Respondent's attempts to settle on a lower participation fee in this time period in hopes for realistic numbers to work with and perhaps the potential to pay increases, should not result in bad faith bargaining. Indeed, Respondent settled on a

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[3] Nor does this retroactively change the credible evidence presented that Respondent, at that time, honestly believed in good faith that they had the inability to do so. Indeed, the Board finds credible Osborne who testified that Respondent could not have submitted an inability to pay declaration prior to May 27th. Osborne further testified that the other bargaining unit negotiations were also delayed until budgets were completed. The factfinder's findings were also not binding on the parties, and they have not completed arbitration. Respondent, in turn, believed the recommendations violated federal and state law and discussed those concerns.

$600,000 fee – for example, if they had been able to convince NDF to maintain the original $400,000 fee that would have translated into money available for increases. Instead, they were able to avoid layoffs and a fiscal emergency.

In the *City of Reno v. Reno Protective Ass'n*, Case No. A1-046096, Item No. 790 (2013), the City asserted that the union failed to negotiate in good faith. "Despite [an] early attempt to schedule a negotiating session, the parties did not actually meet until seven full weeks had passed." *Id.* In explanation for this delay, the City explained that the agreement would need to be approved by the City Council so they first had to meet with them to "gauge the Council's stance on the negotiations." *Id.* The first meeting went poorly, without the parties even agreeing on ground rules, due to "the unprofessional conduct by the lead negotiators for both sides." *Id.* More than a month passed before the second meeting had been scheduled to occur, but that meeting was cancelled as the Chief Negotiator for the union said another matter had arose. The meeting originally scheduled for June was cancelled due to "scheduling conflicts on the [union's] negotiating team" and was not rescheduled – "[n]or was there any meeting held during the entire month of July due to conflict with the vacation scheduled of the [union's] Chief Negotiator." *Id.* "Following the May 29th meeting the parties did not meet again until August" and each of the August meetings were "brief, ten to fifteen minutes apiece … and nothing substantive was accomplished." *Id.* "It is apparent that these meetings were held simply to satisfy the minimum requirement to hold six meetings before declaring impasse." *Id.*

In finding no bad faith bargaining, the Board concluded that the evidence presented showed neither party negotiated in earnest. *Id.* However, here, the Board finds, as detailed above, that Respondent negotiated wholeheartedly. Moreover, in *City of Reno v. Reno Protective Ass'n*, the Board found that "[t]here appeared to be a strong feeling of mutual dislike between the chief negotiators on either side that manifested itself at the first session … and clouded the entire process." *Id.* "The Board considered not only the substance of these two witnesses, but also their demeanor while testifying at the hearing." *Id.*

In the same vein, in the matter at hand, the dislike between the chief negotiators manifested itself not only at the hearing before this Board (though they did not testify and instead were counsel that presented their positions) but through the evidence presented - Complainant's chief negotiator called

Respondent's chief negotiator "clueless" as well as saying "[hope]fully [she didn't] have more lame excuses", "Local 5046 is tired of your lies", sarcastically provided that he was "[g]lad to hear that [she] was capable of simply hitting 'Reply' instead of 'Reply All' when [she] respond[s] to [his] messages", sarcastically inquired whether she was "still representing the ECFPD", as well as repeatedly calling her a liar.

Further, Respondent requested authority (statutory or EMRB decision) from Complainant that would explain how Respondent was bargaining in bad faith. Complainant never provided Respondent with this authority. Instead of offering instructive authority or explanation that would have had Respondent reconsider her position, Complainant's chief negotiator simply called Respondent's chief negotiator "clueless". As indicated below, the Board was not presented with credible evidence that Complainant requested specifics regarding their budgeting process that went unheeded. Instead, Complainant stated they were making their own analysis based on the expected responses to the RFIs.

Finally, in the above-referenced matter, the Board found that "[b]ecause the testimony and demeanor of Mr. Soto on the stand indicated that he was genuinely interested in reaching an agreement, the Board [gave] his testimony significant weight." *Id.* In the same vein, the Board finds the testimony of Respondent's witnesses credible that they were genuinely interested in reaching an agreement, as detailed above and below.

In reviewing our precedent as well as related persuasive authority from the NLRB, generally more has been required in order to find bad faith conduct. However, as indicated, the Board cautions that Respondent's actions herein tethered a precarious line, and the Board viewed this as a close case – one not sufficient for a finding of bad faith bargaining but also one in which Respondent's actions were on the verge of conduct not to be tolerated in bargaining relations. For example, while Respondent genuinely believed the issues before it (namely the impact from the participation in the WFPP and legislative changes) would negatively affect Respondent's budget and the ability to pay increases, they could have approached negotiations with that stance. This may have meant a declaration of an inability to pay earlier on in the process but, with further information, Complainant may have chosen to wait to see if the situation could improve or proceed to fact finding immediately. Again, based on the conduct as a whole and the totality of circumstances, Respondent's conduct was not enough to warrant a bad

faith finding but we emphasize the close outcome herein.

The Board's decision in *Ed. Support Employees Ass'n v. Clark County Sch. Dist*, *supra*, is instructive in this regard. In this case, the Board found that the District failed to bargain in good faith: "both by its conduct surrounding the negotiating sessions between the parties, and in the refusal to meet with the Association to address disputes about the proposed contractual language." *Id.* The District's chief negotiator explained the District's approached was to listen to proposals but not respond. *Id.* Instead, they "would then consult with the superintendent and the Board of Trustees about whether to agree to a proposal or not." *Id.* at 2. "As a general rule the District did not make proposals or counterproposals, and the Board heard no evidence of any District proposals in this round of negotiations." *Id.*

In regards to "[t]he District's [a]ttitude [t]oward [n]egotiations", the Board found that the "need to consult with the School Board before negotiating on any of the Association's proposals raises the question whether the negotiation team actually had much authority, if any at all, to negotiate with the Association's bargaining team." *Id.* at 5. The Board held: "In this case, that fundamental process was removed from the bargaining table to the board room when the merits of the Association's proposals were considered by the School Board rather than the bargaining team." *Id.* "The Act does not required that the School Board be kept in the dark as to the negotiations, but the failure to designate an agent, or bargaining team with negotiation authority is a significant indicator of bad faith bargaining, which we find points toward a finding of bad faith in this case." *Id.*

However, here, it is undisputed that Respondent's negotiating team had the authority to negotiate with Complainant's bargaining team. In *Ed. Support Employees Ass'n*, the District's chief negotiator testified that, essentially, he had no authority and had to resort to outside sources for approval. As the Board held: "In this case, that fundamental process was removed from the bargaining table to the board room when the merits of the Association's proposals were considered by the School Board rather than the bargaining team." *Id.* at 5.

The Board also explained that "the District approached negotiations with the stance that it refused to make any proposals or counterproposals during negotiations. This, too, is a well-recognized indicator of bad faith bargaining." *Id. citing United Tech. Corp.*, 296 NLRB 571, 572 (1989).

While it is true that Respondent, here, did not make any proposals or counterproposals *at the initial session*, the Board was not presented with sufficient evidence that Respondent here had a stance of refusing to make any proposals or counterproposals (instead Respondent agreed to discuss matters which would not have an effect on the budget and indicated they needed to complete their budgeting process to determine whether they could pay for increases). This was in part due to the credibly provided unforeseeable increases imposed by NDF. Respondent presented counterproposals at the June 13th meeting including a declaration of inability to pay for increases as well as inability to pay for other items (while the counterproposals were in essence a proposal to maintain the status quo, this ultimately resulted in the dispense of fruitless marathon discussions and instead a frank statement of their position).

The Board cited to *United Tech. Corp.*, 296 NLRB 571, 572 (1989) in support of the proposition that refusal to make any proposals or counterproposals during negotiations is a well-recognized indicator of bad faith bargaining. This matter is further instructive of our explanation on the failure to make proposals or counterproposal and we clarify as such. The parties met and negotiated at 24 bargaining sessions between April 1986 and March 1987. *Id.* at 571. The first bargaining session was devoted primarily to the establishment of ground rules. *Id.* "Thereafter, the next 12 bargaining sessions … were largely spent with Respondent reading the Union's proposals aloud one-by-one; asking union negotiators questions about each proposal, such as why the Union wanted the proposal and what precisely did the proposal mean; and encouraging the Union to correct assorted typographical, grammatical, and other errors in the proposals." *Id.* "At the conclusion of this phase of the negotiations, *which lasted more than 6 months*, the Respondent had not agreed to any of the Union's proposals and had yet to submit any counterproposals." *Id.* (*emphasis* added).

Further, after all of this, the respondent told the union it was suspending negotiations "in order to investigate a decertification petition allegedly signed by a majority of the unit employees" and then withdrew recognition. *Id.* The NLRB found:

> We find the following factors to be especially significant. First, after **almost 1 year of bargaining with the Union**, the Respondent had not presented any economic proposals, despite repeated prompting from the Union, and had never even internally discussed its economic demands.

> ...
>
> Finally, we find additional evidence of the Respondent's bad-faith bargaining in **its unilateral transfer of a unit employee** from the Respondent's main facility to its Midway Green facility during the course of bargaining without notifying the Union or bargaining over the transfer.
>
> Based on the totality of the circumstances in which the bargaining took place, **including the Respondent's delaying tactics, its statement that it could submit a contract to the Union on a "take-it-or-leave-it" basis, and its unilateral change in a mandatory subject of bargaining,** we find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith.

Id. at 572-73 (**emphasis** added). However, here, the parties only meet twice, with a roughly 2-month delay from the cancelled session, and even if Respondent had been unreasonably delaying as Complainant alleges, Respondent did not continue to do so, instead declaring its inability to pay, with Complainant declaring impasse, so the parties could move on to factfinding and arbitration. Moreover, as indicated above, in the distinction of cases cited by Respondent, there was no allegation of unilateral action here. Nor was there the further conduct as presented in *United Tech. Corp.*

Overall, in *Ed. Support Employees Ass'n*, this Board concluded: "*Both of these factors taken together*[4] established that the District's overall approach to bargaining in this case was tainted by a refusal to bargaining in good faith." *Ed. Support Employees Ass'n*, at 5 (*emphasis* added). However, here, the Board is missing the first factor and the second factor is arguably weaker (Respondent only failed to make counterproposals at one meeting, continued to reason with Complainant on its justification for delaying, and ultimately explained that it did not have the ability to pay and informed of its unforeseen expenses at the second meeting). As such, the cases compared illustrate that while Respondent's conduct did not amount to bad faith bargaining, it came close. The Board finds Respondent's actions did not amount to bad faith bargaining as Respondent credibly testified, as indicated, that it initially believed it was unknown whether Respondent could pay any increases. *See also* Discussion *supra* regarding factfinding; *see also infra* note 5. As also indicated above: "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *Am. Nat. Ins. Co.*, 343 U.S. at 404. By declaring an inability to pay, the parties could immediately proceed to factfinding

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[4] Again, those factors being (a) the failure to designate a bargaining team with negotiation authority, and (b) approaching negotiations with the stance of refusing to make any proposal or counterproposals.

and arbitration. Respondent arguably saved the parties the time of bickering further back and forth (and again, Respondent could have chosen to delay another week, if that was its true intent, by agreeing to June 20th instead of the 13th). The animosity between the chief negotiators was also apparent.

In *Ed. Support Employees Ass'n*, the Board explained: "At this point the parties' options were either to continue to negotiate to reach and agreement or to declare impasse and proceed through the resolution procedure …." *Id.* at 7. "The District did neither." *Id.* "When presented with the Association's request to meet and negotiate the appropriate language for Article 42 the District simply refused." *Id.* "We take this flat-out refusal to meet with the Association to be an indisputable instance of failure to bargain in good faith." *Id.* "The Act does not permit an employer to simply refuse a bargaining agent's request for negotiations concerning a mandatory subject of bargaining." *Id.* However, here, Respondent never "flat-out" refused to discuss a mandatory subject of bargaining but instead proposed meeting when it was practicable resulting in a roughly two-month delay from the cancelled session so Respondent could determine whether it had an inability to pay.

Moreover, when Respondent submitted that it could not pay increases at the June 13th meeting, this clearly signaled the parties would not be able to reach an agreement – as evident by Complainant's declaration of impasse thereafter.[5] The Board was also not presented sufficient credible evidence that

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[5] The Board notes that Complainant filed its prohibited practices complaint on May 17th before the June meeting. Complainant did not make a motion to amend its Complaint. As such, while the Board did consider events thereafter in its decision herein in any event, the pleadings serve as the "outer measure of materiality" and thus events thereafter were not properly before this Board. *See e.g., Nye County Management Employees Ass'n v. Nye County*, Case No. 2018-012 (2019), *citing* NRS 233B.121(1) and (2) (requiring parties in contested cases to receive reasonable notice of matters to be litigated. Failure to comply with the statutory notice requirements of the APA results in an invalid order which must be set aside.), *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 308, 721 P.2d 378 (1986); NRS 233B.121(9) (the APA further restricts agency discretion to rule only on matters officially noticed), *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1253, 78 Cal. Rptr. 3d 372, 381-82 (2008) (The pleadings serve as the "outer measure of materiality"); *Hutton v. Fid. Nat'l Title Co.*, 213 Cal. App. 4th 486, 493, 152 Cal. Rptr. 3d 584, 590 (2013) (stating that "moving party need not refute liability on some theoretical possibility not included in the pleading"). *See also, e.g., Bonner v. City of North Las Vegas*, Docket No. 76408, 2020 WL 3571914, at 3, n. 2, filed June 30, 2020, unpublished deposition (Nev. 2020). Complainant's Complaint includes allegations only up until the date of the filing thereof, though it notes that the parties had a second session "reluctantly scheduled" for June 13th. Complainant's refusal to bargain in good faith cause of action is based on the District's unilaterally cancellation of the second session (which said cancellation has been conceded was done according to the Ground Rules) and failure to reschedule the cancelled session to be held within 5 working days. Complainant's second cause of action limits their allegations to the first and second RFIs and

the money transfer out to their emergency fund would have been properly used to fund Complainant's proposals. In contrast, Respondent's witnesses credibly testified regarding the necessity and priority to fund it as well as forming the intent to do so before negotiations began.

Next, NRS 288.270(g) makes it a prohibited practice to "[f]ail to provide the information required by NRS 288.180." NRS 288.180(2) provides that "reasonable information concerning any subject matter included in the scope of mandatory bargaining" "must be furnished without unnecessary delay."

The Board finds that Respondent complied with NRS 288.180 in responding to Complainant's Requests for Information. Respondent produced all information requested by Complainant excluding Respondent's FY 2018-2019 Audit which credible testimony showed was then unavailable to Respondent.

Complainant's March 20th RFI demanded a significant amount of information by the date of the then scheduled meeting of March 25th (just 5 days). The Board finds credible that much of information demanded was not yet in completed form, readily available for production, and/or had never been generated by Respondent. Further, the Board finds credible that Respondent began to diligently gather and organize the requested information and did not unnecessarily delay in doing so.

Respondent received a second RFI from Complainant on April 30th, and the Board also finds credible that Respondent began to diligently gather, organize, and prepare a response to the second RFI in addition to completing the 1st RFI. The Board finds Osborne credible that a good part of the information was not readily available and some of the documentation had to be gathered and put together in a coherent format. The Board further finds credible the testimony of Minor, in the same vein as the March 20th RFI, the information requested in the April 30th RFI was not readily available

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Respondent's "lame excuses" thereto. Indeed, the Second Amended Notice of Hearing limits Complainant's issues in the same manner. *See* NAC 288.250 (pre-hearing statements); NAC 288.273 (pre-hearing conference); NRS 233B.121 (notice of hearing derived from information afforded in pre-hearing statements and pre-hearing conference). In the same vein, Complainant's pre-hearing statement succinctly limited its issues of fact to the same (unilateral cancellation, failure to reschedule per the Ground Rules, RFIs of March and April, and "refus[al] to negotiate with Local 5046 from March 13, 2019, *until* June 13, 2019"). Complainant's Prehearing Statement (*emphasis* added); Second Amended Notice of Hearing (stating the same).

and needed to be gathered, organized, and prepared for submission by Respondent. Minor described the undertaking as a "massive project".

The Board also finds credible Bingaman's testimony that the information sought by Complainant was not readily available, and preparing the information for production under the RFI was difficult because of the sheer number of volunteers that needed to be reviewed and the number of volunteer organizations that she had to work with to gather the information requested. She also stated that she began gathering the information in March 2019, but it took a significant amount of time to gather and organize the information for the District's 253 volunteers, and 16 volunteer organizations. Bingaman stated that she finished up the information on May 15th (just two days prior to Respondent's issuance of their response). In the same vein, Minor stated they mailed it as soon as they completed the responses.

On April 16th, Respondent replied to Complainant's inquiry on where the documents were. Respondent "sincerely apologized for the delay [and was due to] … an unavoidable personal conflict that called the individual preparing the information for production away from Nevada." Instead of responding to perhaps what could be a sensitive situation, Complainant replied: "Hopefully, you don't have more lame excuses." Minor testified that he was gone with his mother on medical issues at the Mayo Clinic. Respondent was transparent in its efforts to comply with the RFIs. Respondent made it clear from the beginning that it would take some time due to the magnitude of the requests. While Complainant assumed "all of the financial information should be readily available through the district's budget process", the Board was not presented credible evidence that this assumption was accurate, and Respondent unnecessarily delayed furnishing the response.

On May 17th, Respondent issued its response to both RFIs which included a thumb drive containing all the requested information, thousands of pages of documents and information (Complainant stated they didn't receive it until May 20th in the mail). Between March 20th and May 17th, Respondent worked diligently to gather, organize, and prepare the information requested. Minor noted that it was in Respondent's best interest to respond to the RFIs quickly because it makes it easier for both negotiating teams. However, he noted that due to the fact that much of the fiscal information requested was not readily available, staffing limitation, overtaxed departments, and personal conflicts, it

took several weeks for Respondent to respond to the RFIs. The Board finds this credible. Minor testified that he was not trying to delay his response and was working as quickly as possible. The Board also finds credible that the information Complainant said was missing on a thumb drive was inadvertently omitted. Further, it was provided the next day after Complainant informed Respondent of such.

Complainant conceded, as testified by Linstruth, that it had received all information requested at issue before the Board. Based on the facts of this case, and the parties' conduct as a whole, the Board finds that the information requested was "furnished without unnecessary delay." *See, e.g.*, *International Union of Operating Engineers Local 501, AFL-CIO v. Esmeralda County Nevada Board of Commissioners*, Case No. 2018-014 (2019) (finding bad faith bargaining in other respects but not finding as such in regards to RFIs noting that "[w]hile it appears Local 501 did not receive all information requested (in the County's post-hearing brief, it simply states it 'believes that it did comply with all requests'), the hearing did not establish that Local 501 made sufficient requests for what was missing, nor did the parties have sufficient substantive discussions related thereto."). Indeed, it took roughly just 8 weeks to gather, prepare, and produce voluminous amounts of information requested in the instant matter.

The Board's decision in *Ed. Support Employees Ass'n*, *supra*, is also instructive in this regard. "The Association also points to what it claims to be the District's failure to provide it with information and updates about the District's ongoing efforts to separately negotiate its health plan options with a private health-insurance provider." *Id.* at 6. "According to the Association, it was kept in the dark about the contemplated plan changes and premium increases that were being discussed, thus preventing it from meaningful bargaining …." *Id.* The Board held: "While the duty to provide requested information during negotiations is an imperative of the Act, NRS 288.180, we do not see this issue as an indicator of bad faith bargaining in this case because the District did provide the information that was actually requested by the Association …." *Id.* Here, it is undisputed that Respondent provided Complainant with all the information it requested (except perhaps a legislative bill[6]) by the second

[6] While Complainant's counsel contended it was never received, Respondent produced a document showing the contents of the thumb drive including the possible legislative impact. Linstruth testified

negotiations session. In the same vein as the current matter, "[t]he District did not volunteer the information about its negotiations …, but the Board saw no evidence that the District actively misled or deceived the Association about these negotiations." *Id.*

Finally, based on the facts in this case and the issues presented, the Board declines to award costs and fees in this matter.

FINDINGS OF FACT

1. Prior to January 1, 2015, Elko County relied on the NDF for fire suppression activities in the County.

2. In 2014, after the Legislature determined it would no longer provide all risk services, the Board of County Commissioners voted to create a fire suppression district pursuant to NRS Chapter 474.

3. On January 1, 2015, Respondent began its operations as an independent district, separate from the County.

4. Respondent operates its own budget and provides risk services for the County.

5. Initially, Respondent was funded out of the County General Fund.

6. Beginning in July 2018, the County Commissioners voted to remove Respondent from its General Fund, establishing it as a regular tax district funded by a distinct Fire District tax source that cannot be combined with County funds.

7. Both Respondent and the County lacked sufficient resources to manage wildland fire suppression activities in the County.

8. Respondent participates in the WFPP managed by NDF.

9. Prior to FY 2018-2019, NDF did not use a formula to determine membership costs associated with participation in the WFPP.

10. Instead, NDF required Respondent to pay a $400,000.00 participation fee.

11. For FY 2019-2020, NDF created a formula that it would use to determine and assign participation costs to the members.

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that he did not perform an in-depth review of the documents that were contained on the thumb drive initially and did not recall whether he opened the document before the June meeting.

12. NDF informed its membership of its decision to apply a cost formula at a meeting held in February 2019 and invited its members to participate in a meeting to discuss the application of the formula.

13. NDF informed Respondent that it would likely expect its participation fees to increase to somewhere around $990,000.00 annually.

14. Prior to the February meeting, Respondent was not aware that NDF intended to raise its participation fee for the following fiscal year.

15. NDF initiated a meeting in March 2019 and, at this meeting, NDF explained its new fee calculation formula to its membership.

16. NDF informed Respondent that its participation fee for FY 2019-2020 would be increasing to roughly over a million dollars annually.

17. Respondent then approached NDF to try to negotiate a lower participation fee which continued into May.

18. Respondent and NDF settled on a fee of $600,000.00 for the 2019-2020 fiscal year.

19. The negotiations for the FY 2019-2020 CBA between the parties were also occurring during this time with this background in mind.

20. In January 2019, the parties scheduled their first two negotiations session for March 13, 2019 and March 25, 2019.

21. On March 13, 2019, the parties engaged in the first meeting related to negotiations for FY 2019- 2020.

22. At the March 13th meeting, the parties negotiated their Ground Rules for the negotiations.

23. Complainant presented several initial proposals for amendments to the CBA.

24. Although Respondent reviewed the proposals, Respondent did not issue a counterproposal at that meeting.

25. Respondent informed Complainant that it was not ready to negotiate on matters with a fiscal impact because it was too early in the budgeting process, and Respondent needed more time to understand its financial position for the following year.

26. The meeting came to an end by mutual agreement of the parties.

27. As early as March 2019, Respondent indicated it would negotiate on matters that did not have a fiscal impact while it waited for confirmation on its budgetary status.

28. Complainant asserted they had none.

29. On March 21, 2019, Respondent emailed Complainant to request the next meeting, scheduled for March 25, 2019, be rescheduled.

30. Respondent also requested the third meeting, tentatively scheduled for April 8th, be rescheduled as their counsel and chief negotiator received a jury summons that required her appearance on April 8th.

31. Complainant informed that they would not agree to reschedule the March 25th meeting.

32. On March 22nd, Respondent emailed again requesting to cancel the March 25th meeting reiterating that Respondent was not yet able to negotiate on matters with a fiscal impact as it was waiting for the completion of its budgeting process.

33. Respondent recommended the meeting be rescheduled for early June due to the number of scheduling conflicts previously expressed by the parties during the March 13th meeting and in consideration of Respondent's wish to better understand any legislative changes that may occur during the 2019 Legislative Session.

34. On March 25th, Complainant demanded that the next bargaining session be scheduled for April 12th alleging that Respondent was needlessly delaying negotiations.

35. On March 27th, Respondent asserted it was not trying to needlessly delay negotiations, but instead, was simply asking to effectively postpone further negotiations until Respondent had a better understanding of its budget.

36. Respondent stated the intent was to have negotiations be as productive as possible, specifically it would be a better use of time and resources to wait until Respondent was practically able to negotiate on matters with a fiscal impact.

37. Respondent also indicated it was not available on April 12th.

38. On April 2nd, Complainant requested Respondent's dates of availability so the parties could schedule the next session.

39. Respondent proposed several dates for early June (again reiterating that Respondent believed setting dates before June would be fruitless and wasteful).

40. On May 10th, Complainant emailed Respondent to determine whether Respondent would be available to meet on June 13th or 20th.

41. Respondent responded that day indicating availability on the 13th which was then confirmed by Complainant.

42. Complainant filed it prohibited practices complaint with this Board on May 17th.

43. On June 13th, the parties met for their second negotiation session.

44. At this meeting, Respondent submitted its declaration of inability to pay for any financial changes to the CBA, and Complainant declared impasse.

45. In September 2019, the parties engaged in fact finding pursuant to NRS 288.200 – Respondent did not agree to accept the Fact Finder's Recommendation.

46. In December 2019, the parties engaged in post-impasse negotiations.

47. The parties engaged an arbitrator to oversee interest arbitration, scheduled for April 30th and May 1st.

48. Complaint submitted requests for information to Respondent.

49. On March 20, 2019, Complainant submitted such a request to Respondent.

50. The next day, on March 21st, Respondent confirmed receipt and informed that Respondent would not be able to produce the requested information by March 25th, the date requested by Complainant.

51. Respondent indicated they could not produce what was requested before April 12th.

52. Complainant stated it required the production before April 5th.

53. Respondent was unable to complete its responses to the RFI by April 12th.

54. While working on its production of documents for the March 20th RFI, Respondent received a second RFI from Complaint on April 30th.

55. On May 10th, Complainant sent an email demanding all the production of information by the next Friday.

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56. On May 15th, the response to Complainant's RFI related to District Volunteer Firefighters was finalized.

57. On May 17th, Respondent issued its response to both RFIs.

58. Included in this response was a thumb drive containing the requested information.

59. On June 12th, Complainant informed Respondent that the information requested in the March 20th and April 30th RFIs had not been included on the thumb drive.

60. This information was provided the next day, on June 13th.

61. In March, after it had already scheduled the first two negotiation sessions, Respondent received notice from NDF that its WFPP participation fee would nearly triple.

62. Respondent reasonably needed time to negotiate with NDF.

63. Respondent continued with the first meeting to notify Complainant of budgetary concerns in hopes of handling any issues unrelated to fiscal matters, of which Complainant informed there were none.

64. Testimony was credibly presented that Respondent sincerely wished to reach an agreement and was simply attempting to do so as practicably as possible with the information and situation before it.

65. The Ground Rules provide: "Negotiations sessions may be cancelled with 48 hours notice to the other chief negotiators. Cancelled sessions will be rescheduled to be held within 5 working days of the cancelled session; or as soon as practicable and with the agreement of both chief negotiators."

66. Respondent gave proper notice to cancel the meeting.

67. The dispute surrounds the failure to reschedule the meeting to be held within 5 working days of the cancelled meeting.

68. The intent of the parties supports Respondent's interpretation.

69. The credible testimony made clear that the subject language is routinely included in ground rules, and neither Elko nor the District ever interpreted this rule as absolutely requiring a canceled meeting to be rescheduled to be held within 5 days unless both negotiators agree otherwise.

70. Amanda Osborne, who regularly participates in negotiations on behalf of the County and District, indicated the Ground Rules at issue were standard and she interpreted it as rescheduling within 5 working days or as soon as they are able to.

71. Osborne explained that it is not common to schedule cancelled meetings within 5 days as "schedules are pretty difficult to coordinate with that sort of notice".

72. Complainant failed to present credible evidence that absolutely required the meeting to be rescheduled within 5 working unless both parties agreed otherwise.

73. Patrick Linstruth, officer in Local 5046, stated that "if [the parties could] not" hold another session within five days, the parties were able to reschedule "as soon as practicable with the agreement of both negotiators or another date that both parties agree to."

74. So while counsel for Complainant had Linstruth clarify, that a cancelled session be rescheduled within 5 days, Linstruth initially had a broader reading.

75. "[A]s soon as practicable" could have considered the above and indeed Respondent outwardly maintained the position that they were trying to approach negotiations as practicable as possible.

76. Respondent's witnesses were credible that they were not trying to needlessly delay negotiations and were doing everything in their power to comply.

77. On March 22nd, Respondent cancelled the March 25th bargaining session requesting to "hold off" the next meeting until after June 6th as only fiscal matters were in play and with the above background in mind.

78. Complainant made it clear that they would not wait roughly two months for the next session.

79. Respondent then attempted to reason with Complainant that meeting would not be productive until Respondent could negotiate on fiscal matters and Respondent determined whether it could pay for the proposals.

80. Respondent was in a perilous situation with new fees from the NDF that Respondent credibly provided were unforeseeable and could have led to a fiscal emergency and reductions in force.

81. It only took Respondent until May to settle on a lower fee with NDF.

82. As testimony also credibly established, there were scheduling conflicts that only lead to slight delays here.

83. In March, Respondent provided several dates for June with the parties eventually agreeing to June 13th (the parties had several discussions prior thereto related to the response to the RFIs).

84. The parties indeed met on June 13th with Complainant declaring impasse and thereafter the parties engaged in fact finding, post-impasse negotiations, and have engaged an arbitrator to oversee interest arbitration.

85. While Complainant argues Respondent did nothing, instead declaring an inability to pay to increases, Complainant assumes that nothing went into this determination.

86. The Board was not presented with credible testimony establishing that Respondent did so without a sufficient basis.

87. While Respondent in theory could have simply declared an inability to pay initially (though as indicated below, Respondent was not certain initially that it actually had an inability to pay), Respondent reasonably attempted to find a solution so it could perhaps pay for increases.

88. In this case, there was simply a roughly 2-month delay from the cancelled meeting.

89. Respondent was also preparing voluminous responses to Complainant's RFIs and, Respondent genuinely believed negotiations would be more practicable once the responses were completed (Complainant was performing its own analysis of Respondent's ability to pay based on the response to the RFIs).

90. Respondent sought to avoid fruitless marathon discussions by instead providing frank statements of their position.

91. Respondent made its position known including the hope to obtain a better understanding of its budgeting process and wished to agree to a short postponement so it could hopefully pay for increases.

92. Complainant asked for "a list of pending legislative bills and an explanation as to how they effect the District's negotiations".

93. Respondent agreed to provide this with its response to the RFIs.

94. Complainant did not request specifics regarding the budgeting process.

95. This is all in the context of a roughly 2-month delay.

96. Linstruth testified that Respondent was specifically informed of the NDF changes at their second meeting in June (also indicating that the information was on the thumb drive but he only "glanced at a couple of them" a day or two after receipt on May 20th).

97. While the Board agrees that perhaps it would have been helpful for Respondent to specifically explain the circumstances surrounding their budget, Respondent did not resolve that issue until May (as such a tentative budget being due on April 15th is not determinative and the final budget documents were not due until June).

98. Bingaman also credibly testified regarding the substantial difference between the tentative and final budget.

99. The Board saw no evidence that Respondent actively misled or deceived Complainant about the impacts of their budget.

100. No credible evidence was presented by Complainant that it requested specifics into the Respondent's budgeting process and Respondent misled or deceived Complainant.

101. On March 25th, Complainant solely requested "a list of all pending legislative bills … and an explanation as to how they supposedly prevent the district from proceeding with the instant negotiations."

102. Respondent responded (in two days) that it was not attempting to needlessly delay and was simply doing so to understand their budget to assist in negotiation of matters with a fiscal impact.

103. Respondent also stated: "Further, at no point has the District alleged that a bill or set of bills prevent the District from proceeding with negotiations. The District has simply asserted that it would be more fruitful, and thus a better use of time and resources; in its opinion, if negotiations on matters that have a fiscal impact were postponed until the District has a better idea about where certain legislation is going."

104. Respondent agreed to provide Complainant with a copy of the bill Respondent was concerned with included with its responses to the rest of Complainant's RFI.

105. Complainant did not object to Respondent including it in its responses.

106. Respondent again proposed early June for the next meeting.

107. Complainant responded that he believed she had no intention of attending the March 25th session, though the Board was not provided credible evidence that this was indeed the case when they originally agreed to this date.

108. Complainant also responded requesting a date for the month of April and indicating his hopes that "the district is financially prudent enough to include them in its tentative budget".

109. On April 2nd, Respondent indicated that she apologized for any misunderstanding of the next meeting, and that Respondent was not open to meeting until after June 6th (after the close of the legislative session) as it earnestly believed it would be both fruitless and wasteful.

110. Respondent reiterated that at this point it did not know if it could actually pay for increases.

111. Complainant then stated that "it is not Local 5046's fault that you and the district's administration are incapable of completing the budgeting process properly and formulating appropriate counter-proposals."

112. Respondent stated that they were complying with the Ground Rules as they were "seeking to reschedule the canceled meeting as soon as practicable, and [they were] actively preparing the documents requested by IAFF."

113. Complainant then responded (April 15th), that it did not receive the responses to the RFI.

114. Respondent responded (the next day) that responses were not issued on April 12th as planned due to a personal conflict.

115. Complainant responded (April 30th), inquiring as to the status of the first RFI and requested a second RFI "to complete an analysis of the district's finances".

116. Complainant was making its own analysis of Respondent's budget.

117. On May 7th, Complainant requested an update.

118. Within two days (on May 9th), Respondent replied that she apologized for the delay and was out of the office due to a seminar as well as providing an update that they were diligently gathering the information requested and would send their response with the information as soon as they could.

119. At that point (May 10th), Complainant requested June 13th or the 20th for the next session.

120. Respondent replied the same day agreeing to the 13th (as such, Respondent could have delayed another week by agreeing to the 20th).

121. Minor testified that he disagreed with the factfinder's report.

122. The subsequent findings of the factfinder are not determinative in regard to the determination of whether there had been bad faith bargaining prior thereto.

123. Nor does this retroactively change the credible evidence presented that Respondent, at that time, honestly believed in good faith that they had the inability to do so.

124. The Board finds credible Osborne who testified that Respondent could not have submitted an inability to pay declaration prior to May 27th.

125. Osborne further testified that the other bargaining unit negotiations were also delayed until budgets were completed.

126. The factfinder's findings were also not binding on the parties, and they have not completed arbitration.

127. Respondent, in turn, believed the recommendations violated federal and state law and discussed those concerns.

128. Respondent's attempts to settle on a lower participation fee in this time period in hopes for realistic numbers to work with and perhaps the potential to pay increases, should not result in bad faith bargaining.

129. Respondent settled on a $600,000 fee – for example, if they had been able to convince NDF to maintain the original $400,000 fee that would have translated into money available for increases.

130. Instead, they were able to avoid layoffs and a fiscal emergency.

131. The dislike between the chief negotiators manifested itself not only at the hearing before this Board.

132. Complainant's chief negotiator called Respondent's chief negotiator "clueless" as well as saying "[hope]fully [she didn't] have more lame excuses", "Local 5046 is tired of your lies",

sarcastically provided that he was "[g]lad to hear that [she] was capable of simply hitting 'Reply' instead of 'Reply All' when [she] respond[s] to [his] messages", sarcastically inquired whether she was "still representing the ECFPD", as well as repeatedly calling her a liar.

133. Respondent requested authority (statutory or EMRB decision) from Complainant that would explain how Respondent was bargaining in bad faith.

134. Instead of offering instructive authority or explanation that would have had Respondent reconsider her position, Complainant's chief negotiator simply called Respondent's chief negotiator "clueless".

135. The Board was not presented with credible evidence that Complainant requested specifics regarding their budgeting process that went unheeded.

136. The Board finds the testimony of Respondent's witnesses credible that they were genuinely interested in reaching an agreement.

137. Respondent's negotiating team had the authority to negotiate with Complainant's bargaining team.

138. While it is true that Respondent, here, did not make any proposals or counterproposals *at the initial session*, the Board was not presented with sufficient evidence that Respondent here had a stance of refusing to making any proposals or counterproposals (instead Respondent agreed to discuss matters which would not have an effect on the budget and indicated they needed to complete their budgeting process to determine whether they could pay for increases).

139. This was in part due to the credibly provided unforeseeable increases imposed by NDF.

140. Respondent presented counterproposals at the June 13th meeting including a declaration of inability to pay for increases as well as inability to pay for other items (while the counterproposals were in essence a proposal to maintain the status quo, this ultimately resulted in the dispense of fruitless marathon discussions and instead a frank statement of their position).

141. The parties only meet twice, with a roughly 2-month delay from the cancelled session, and even if Respondent had been unreasonably delaying as Complainant alleges, Respondent did not continue to do so, instead declaring its inability to pay, with Complainant declaring impasse, so the parties could move on to factfinding and arbitration.

142. Nor was there the further conduct as presented in *United Tech. Corp.*

143. Here, the Board is missing the first factor from *Ed. Support Employees Ass'n*, and the second factor is arguably weaker (Respondent only failed to make counterproposals at one meeting, continued to reason with Complainant on its justification for delaying, and ultimately explained that it did not have the ability to pay and informed of its unforeseen expenses at the second meeting).

144. Respondent credibly testified, as indicated, that it initially believed it was unknown whether Respondent could pay any increases.

145. By declaring an inability to pay, the parties could immediately proceed to factfinding and arbitration.

146. Respondent arguably saved the parties the time of bickering further back and forth (and again, Respondent could have chosen to delay another week, if that was its true intent, by agreeing to June 20th instead of the 13th).

147. Respondent never "flat-out" refused to discuss a mandatory subject of bargaining but instead proposed meeting when it was practicable resulting in a roughly two-month delay from the cancelled session so Respondent could determine whether it had an inability to pay.

148. When Respondent submitted that it could not pay increases at the June 13th meeting, this clearly signaled the parties would not be able to reach an agreement – as evident by Complainant's declaration of impasse thereafter.

149. Complainant did not make a motion to amend its Complaint.

150. Complainant's Complaint includes allegations only up until the date of the filing thereof, though it notes that the parties had a second session "reluctantly scheduled" for June 13th. Complainant's refusal to bargain in good faith cause of action is based on the District's unilaterally cancellation of the second session (which said cancellation has been conceded was done according to the Ground Rules) and failure to reschedule the cancelled session to be held within 5 working days.

151. Complainant's second cause of action limits their allegations to the first and second RFIs and Respondent's "lame excuses" thereto.

152. The Second Amended Notice of Hearing limits Complainant's issues in the same manner.

153. Complainant's pre-hearing statement succinctly limited its issues of fact to the same (unilateral cancellation, failure to reschedule per the Ground Rules, RFIs of March and April, and "refus[al] to negotiate with Local 5046 from March 13, 2019, until June 13, 2019").

154. The Board was also not presented sufficient credible evidence that the money transfer out to their emergency fund would have been properly used to fund Complainant's proposals.

155. Respondent's witnesses credibly testified regarding the necessity and priority to fund it as well as forming the intent to do so before negotiations began.

156. Respondent produced all information requested by Complainant excluding Respondent's FY 2018-2019 Audit which credible testimony showed was then unavailable to Respondent.

157. Complainant's March 20th RFI demanded a significant amount of information by the date of the then scheduled meeting of March 25th (just 5 days).

158. The Board finds credible that much of information demanded was not yet in completed form, readily available for production, and/or had never been generated by Respondent.

159. The Board finds credible that Respondent began to diligently gather and organize the requested information and did not unnecessarily delay in doing so.

160. Respondent received a second RFI from Complainant on April 30th, and the Board also finds credible that Respondent began to diligently gather, organize, and prepare a response to the second RFI in addition to completing the 1st RFI.

161. The Board finds Osborne credible that a good part of the information was not readily available and some of the documentation had to be gathered and put together in a coherent format.

162. The Board further finds credible the testimony of Minor, in the same vein as the March 20th RFI, the information requested in the April 30th RFI was not readily available and needed to be gathered, organized, and prepared for submission by Respondent. Minor described the undertaking as a "massive project".

163. The Board also finds credible Bingaman's testimony that the information sought by Complainant was not readily available, and preparing the information for production under the RFI was difficult because of the sheer number of volunteers that needed to be reviewed and the number of volunteer organizations that she had to work with to gather the information requested.

164. She also stated that she began gathering the information in March 2019, but it took a significant amount of time to gather and organize the information for the District's 253 volunteers, and 16 volunteer organizations.

165. Bingaman stated that she finished up the information on May 15th (just two days prior to Respondent's issuance of their response).

166. Minor stated they mailed it as soon as they completed the responses.

167. On April 16th, Respondent replied to Complainant's inquiry on where the documents were. Respondent "sincerely apologized for the delay [and was due to] … an unavoidable personal conflict that called the individual preparing the information for production away from Nevada."

168. Instead of responding to perhaps what could be a sensitive situation, Complainant replied: "Hopefully, you don't have more lame excuses."

169. Minor testified that he was gone with his mother on medical issues at the Mayo Clinic. Respondent was transparent in its efforts to comply with the RFIs.

170. Respondent made it clear from the beginning that it would take some time due to the magnitude of the requests.

171. While Complainant assumed "all of the financial information should be readily available through the district's budget process", the Board was not presented credible evidence that this assumption was accurate, and Respondent unnecessarily delayed furnishing the response.

172. On May 17th, Respondent issued its response to both RFIs which included a thumb drive containing all the requested information, thousands of pages of documents and information (Complainant stated they didn't receive it until May 20th in the mail).

173. Between March 20th and May 17th, Respondent worked diligently to gather, organize, and prepare the information requested.

174. Minor noted that it was in Respondent's best interest to respond to the RFIs quickly because it makes it easier for both negotiating teams.

175. The Board finds credible that due to the fact that much of the fiscal information requested was not readily available, staffing limitation, overtaxed departments, and personal conflicts, it took several weeks for Respondent to respond to the RFIs.

176. Minor testified that he was not trying to delay his response and was working as quickly as possible.

177. The Board also finds credible that the information Complainant said was missing on thumb drive was inadvertently omitted.

178. It was provided the next day after Complainant informed Respondent of such.

179. Complainant conceded, as testified by Linstruth, that it had received all information requested at issue before the Board.

180. It took roughly just 8 weeks to gather, prepare, and produce voluminous amounts of information requested in the instant matter.

181. It is undisputed that Respondent provided Complainant with all the information it requested (except perhaps a legislative bill) by the second negotiations session.

182. However, while Complainant's counsel contended it was never received, Respondent produced a document showing the contents of the thumb drive including the possible legislative impact, Linstruth testified that he did not perform an in-depth review of the documents that were contained on thumb drive initially and did not recall whether he opened the document before the June meeting.

183. In the same vein as the current matter, "[t]he District did not volunteer the information about its negotiations …, but the Board saw no evidence that the District actively misled or deceived the Association about these negotiations."

184. If any of the foregoing findings is more appropriately construed as a conclusion of law, it may be so construed.

CONCLUSIONS OF LAW

1. The Board is authorized to hear and determine complaints arising under the Government Employee-Management Relations Act.

2. The Board has exclusive jurisdiction over the parties and the subject matters of the Complaint on file herein pursuant to the provisions of NRS Chapter 288.

3. The Act imposes a reciprocal duty on employers and bargaining agents to negotiate in good faith concerning the mandatory subjects of bargaining listed in NRS 288.150.

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4. It is a prohibited practice for a local government employer willfully to refuse to bargain collectively in good faith with the exclusive representative as required in NRS 288.150.

5. A party's conduct at the bargaining table must evidence a sincere desire to come to an agreement.

6. The determination of whether there has been such sincerity is made by drawing inferences from conduct of the parties as a whole.

7. The duty to bargain in good faith does not require that the parties actually reach an agreement but does require that the parties approach negotiations with a sincere effort to do so.

8. In order to show bad faith, a complainant must present substantial evidence of fraud, deceitful action or dishonest conduct.

9. Adamant insistence on a bargaining position or "hard bargaining" is not enough to show bad faith bargaining.

10. Bad faith bargaining "does not turn on a single isolated incident; but rather the Board looks at the totality of conduct throughout negotiations to determine 'whether a party's conduct at the bargaining table evidences a real desire to come into agreement."

11. Based on the facts of this case, the parties' conduct as a whole, and the totality of the circumstances, the Board finds that Respondent did not engaged in bad faith bargaining.

12. Complainant failed to show bad faith and "present 'substantial evidence of fraud, deceitful action or dishonest conduct.''

13. The Board finds that Respondent's delays here do not amount to a prohibited practice based on the facts of this case.

14. The Board may construe the parties' CBA and resolve ambiguities as necessary to determine whether or not a unilateral change has been committed.

15. We generally assign common or normal meanings to words in a contract.

16. Furthermore, "[a] court should not interpret a contract so as to make meaningless its provisions," and "[e]very word must be given effect if at all possible.'"

17. "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."

18. "In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'"

19. "A contract is ambiguous when it is subject to more than one reasonable interpretation."

20. The contract is ambiguous as both parties' interpretations are reasonable.

21. While the phrases are separate by a semicolon, this is generally not determinative.

22. In other words, "and with the agreement of both chief negotiators" could apply to both clauses and signify that that the chief negotiators must agree on a date and one cannot be unilaterally set.

23. Complainant's urged reading could also result in a harsh and unreasonable contract against Nevada Supreme Court directives.

24. "The best approach for interpreting an ambiguous contract is to delve beyond its express terms and 'examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties.'".

25. "Practicable" is simply defined as "capable of being done, effected, or put into practice, with the available means; feasible (*i.e.* 'a practicable solution')."

26. Regardless, **and more importantly**, even if Complainant's interpretation were correct, Complainant failed to present substantial evidence of fraud, deceitful action or other dishonest conduct by Respondent as further explained below.

27. In other words, **the Board would still have not found bad faith bargaining in this case even if Respondent was required to have the next meeting be held within 5 working days.**

28. Simply a failure to reschedule meetings within 5 working days, in connection with the conduct of the parties as a whole, does not lead this Board to find bad faith bargaining.

29. Moreover, the logical end to Complainant's argument is that this Board would essentially be required to find bad faith bargaining simply because one party refused to allow a session to be rescheduled greater than within 5 working without taking into consideration the totality of the circumstances or the parties conduct as a whole.

30. This would be in direct contravention to the established methods for determining bad faith bargaining by this Board and persuasive NLRB precedent.

31. In other words, any breach of a contractual provision (which the Board does not have jurisdiction over) does not necessarily, in it of itself, lead to a prohibited labor practice.

32. Indeed, based on the facts of this case and the totality of the circumstances, the Board cannot find Respondent engaged in the prohibited practice of bad faith bargaining.

33. Complainant would have this Board order that Respondent engaged in bad faith bargaining because of a roughly 2-month reasonable delay from the cancelled meeting on March 25th until June 13th.

34. The Board will not so find based on the facts of this case including the parties' conduct as whole and totality of the circumstances.

35. In support of its position, Complainant cites to the 1977 Florida District Court of Appeals in which the Florida Public Employees Relations Commission (PERC) found certain unfair labor practices.

36. However, in this case, PERC found that *a unilateral change* had been committed by "not during a bargaining session, the Board, following the recommendations of the superintendent, adopted a 1975-76 salary schedule for all Board employees, including a 5% cut in salaries, a 5% cut in supplements, a freeze on increments and a change in the school calendar which eliminated pre-school planning days."

37. In contrast, there has been no allegation of a unilateral change in this case.

38. PERC noted that the regulations which required either a reduction in salaries or to pay "had been in effect for some time prior to the June 3rd meeting and the Board was not suddenly confronted with the prospect that its operating budget for the next succeeding year might be less than the preceding year".

39. However, as indicated, Respondent was faced with an unprecedent change that may have led to layoffs.

40. Simply because an attempted solution did not come to fruition does not translate into bad faith bargaining in this case based on the conduct of the parties as a whole and the totality of the circumstances.

41. While the District Court of Appeals of Florida generally stated the "expressed reason for not bargaining on the ground of its uncertain fiscal future cannot be excused", that statement must not be read in isolation but in context of the entire case.

42. The District Court of Appeals of Florida cited, in support of this proposition, to the United States Supreme Court case of *NLRB v. American National Insurance Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952).

43. In that case, the United States Supreme Court explained: "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position."

44. The District Court of Appeals of Florida clarified the reasoning of the decision: "The Board finally made a counter-offer on July 3, 1975, offering a 3% reduction as a temporary salary schedule. The Board could have easily made a tentative counterproposal *before it initiated the cuts* on June 3, 1975, in the very midst of bargaining."

45. The District Court of Appeals of Florida likened the matter of *NLRB v. Hondo Drilling Co., N.S.L.*, 525 F.2d 864 (*emphasis* added) (5th Cir. 1976) ("a similar claim by an employer, an oil drilling company, that it was necessary to institute *a unilateral action* involving wage increases, holidays, vacations, etc., because of the urgency of the circumstances surrounding it") and distinguished *NLRB v. Minute Maid Corporation*, 283 F.2d 705 (*emphasis* added) (5th Cir. 1960) (holding "the employer was not guilty of a failure to bargain collectively ... [as it] *excused Minute Maid from bargaining on economic matters when, at that time, the employer had no knowledge of the extent of the freeze damage*").

46. Complainant also cited to the Court of Appeals of Arizona case of *City of Phoenix v. Phoenix Employment Relations Bd. ex rel. Am. Fed'n of State, Cty. & Mun. Employees Ass'n, Local 2384*, 145 Ariz. 92, 96, 699 P.2d 1323, 1327 (Ct. App. 1985).

47. However, in that case, the Court explained: "In *Pease*, the administrative law judge found that all issues were discussed between the parties and principal issues were discussed at length. The contrary is true in this case."

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48. "The trial court found that there was substantial evidence to support PERB's findings that the City's '[a]dherence to the position that ... the resultant guidelines were mandatory precluded the honest give-and-take of bargaining which could consider all of the rationale and arguments of the employee organizations participating in the meet and confer process.'"

49. The Court of Appeal of Arizona noted: "Although one party to the collective negotiating process may adhere to a position throughout the negotiations, that party must nevertheless submit the issue to negotiation and engage in a full exchange of communication pertaining to its position. '[R]efusals to discuss mandatory subjects of bargaining run afoul of [collective] bargaining requirements.'"

50. Here, there was no refusal to discuss mandatory subjects of bargaining, and there was no credible evidence presented that Respondent did not "engage in a full exchange of communication pertaining to its position."

51. Just because Respondent may have theoretically been able to pay increases (as subsequently found by the factfinder) does not necessarily mean it required Respondent to do so – Complainant provided the Board nothing to the contrary. *See* NRS 288.150 (*only* the "right to reduce in force or lay off" is predicated on a "lack of money", not a requirement for increases).

52. The Board has not held that the act of declaring an inability to pay amounts to bad faith bargaining.

53. Complainant's main contention is essentially Respondent should have declared its inability to pay initially and not waited three months to do so.

54. In the *City of Reno v. Reno Protective Ass'n*, Case No. A1-046096, Item No. 790 (2013), the City asserted that the union failed to negotiate in good faith.

55. "Despite [an] early attempt to schedule a negotiating session, the parties did not actually meet until seven full weeks had passed."

56. In explanation for this delay, the City explained that the agreement would need to be approved by the City Council so they first had to meet with them to "gauge the Council's stance on the negotiations."

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57. The first meeting went poorly, without the parties even agreeing on ground rules, due to "the unprofessional conduct by the lead negotiators for both sides."

58. More than a month passed before the second meeting had been scheduled to occur, but that meeting was cancelled as the Chief Negotiator for the union said another matter had arose.

59. The meeting originally scheduled for June was cancelled due to "scheduling conflicts on the [union's] negotiating team" and was not rescheduled – "[n]or was there any meeting held during the entire month of July due to conflict with the vacation scheduled of the [union's] Chief Negotiator."

60. "Following the May 29th meeting the parties did not meet again until August" and each of the August meetings were "brief, ten to fifteen minutes apiece … and nothing substantive was accomplished."

61. "It is apparent that these meetings were held simply to satisfy the minimum requirement to hold six meetings before declaring impasse."

62. In finding no bad faith bargaining, the Board concluded that the evidence presented showed neither party negotiated in earnest.

63. In *City of Reno v. Reno Protective Ass'n*, the Board found that "[t]here appeared to be a strong feeling of mutual dislike between the chief negotiators on either side that manifested itself at the first session … and clouded the entire process."

64. "The Board considered not only the substance of these two witnesses, but also their demeanor while testifying at the hearing."

65. The Board's decision in *Ed. Support Employees Ass'n v. Clark County Sch. Dist*, *supra*, is instructive in regard to close decision made herein.

66. In this case, the Board found that the District failed to bargain in good faith: "both by its conduct surrounding the negotiating sessions between the parties, and in the refusal to meet with the Association to address disputes about the proposed contractual language."

67. The District's chief negotiator explained the District's approached was to listen to proposals but not respond.

68. Instead, they "would then consult with the superintendent and the Board of Trustees about whether to agree to a proposal or not."

69. "As a general rule the District did not make proposals or counterproposals, and the Board heard no evidence of any District proposals in this round of negotiations."

70. In regards to "[t]he District's [a]ttitude [t]oward [n]egotiations", the Board found that the "need to consult with the School Board before negotiating on any of the Association's proposals raises the question whether the negotiation team actually had much authority, if any at all, to negotiate with the Association's bargaining team."

71. The Board held: "In this case, that fundamental process was removed from the bargaining table to the board room when the merits of the Association's proposals were considered by the School Board rather than the bargaining team."

72. "The Act does not required that the School Board be kept in the dark as to the negotiations, but the failure to designate an agent, or bargaining team with negotiation authority is a significant indicator of bad faith bargaining, which we find points toward a finding of bad faith in this case."

73. In *Ed. Support Employees Ass'n*, the District's chief negotiator testified that, essentially, he had no authority and had to resort to outside sources for approval.

74. As the Board held: "In this case, that fundamental process was removed from the bargaining table to the board room when the merits of the Association's proposals were considered by the School Board rather than the bargaining team."

75. The Board also explained that "the District approached negotiations with the stance that it refused to make any proposals or counterproposals during negotiations. This, too, is a well-recognized indicator of bad faith bargaining."

76. The Board cited to *United Tech. Corp.*, 296 NLRB 571, 572 (1989) in support of the proposition that refusal to make any proposals or counterproposals during negotiations is a well-recognized indicator of bad faith bargaining.

77. This matter is further instructive of our explanation on the failure to make proposals or counterproposal and we clarify as such.

78. The parties met and negotiated at 24 bargaining sessions between April 1986 and March 1987.

79. The first bargaining session was devoted primarily to the establishment of ground rules.

80. "Thereafter, the next 12 bargaining sessions … were largely spent with Respondent reading the Union's proposals aloud one-by-one; asking union negotiators questions about each proposal, such as why the Union wanted the proposal and what precisely did the proposal mean; and encouraging the Union to correct assorted typographical, grammatical, and other errors in the proposals."

81. "At the conclusion of this phase of the negotiations, *which lasted more than 6 months*, the Respondent had not agreed to any of the Union's proposals and had yet to submit any counterproposals."

82. In *Ed. Support Employees Ass'n*, this Board concluded: "*Both of these factors taken together* established that the District's overall approach to bargaining in this case was tainted by a refusal to bargaining in good faith."

83. The Board notes that Complainant filed its prohibited practices complaint on May 17th before the June meeting. As such, while the Board did consider events thereafter in its decision herein in any event, the pleadings serve as the "outer measure of materiality" and thus events thereafter were not properly before this Board pursuant to the authorities cited herein.

84. NRS 288.270(g) makes it a prohibited practice to "[f]ail to provide the information required by NRS 288.180.

85. NRS 288.180(2) provides that "reasonable information concerning any subject matter included in the scope of mandatory bargaining" "must be furnished without unnecessary delay."

86. The Board finds that Respondent complied with NRS 288.180 in responding to Complainant's Requests for Information.

87. Based on the facts of this case, and the parties conduct as a whole, the Board finds that the information requested was "furnished without unnecessary delay."

88. The Board's decision is *Ed. Support Employees Ass'n*, *supra*, is also instructive in this regard.

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89. "The Association also points to what it claims to be the District's failure to provide it with information and updates about the District's ongoing efforts to separately negotiate its health plan options with a private health-insurance provider."

90. "According to the Association, it was kept in the dark about the contemplated plan changes and premium increases that were being discussed, thus preventing it from meaningful bargaining …."

91. The Board held: "While the duty to provide requested information during negotiations is an imperative of the Act, NRS 288.180, we do not see this issue as an indicator of bad faith bargaining in this case because the District did provide the information that was actually requested by the Association …."

92. An award of fees and costs is not warranted in this case.

93. If any of the foregoing conclusions is more appropriately construed as a finding of fact, it may be so construed.

ORDER

Based on the foregoing, it is hereby ordered that the Board finds in favor of Respondent as set forth above. Complainant shall take nothing by way of its Complaint.

Dated this 8th day of July 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

By:_____
BRENT ECKERSLEY, ESQ., Chair

By:_____
SANDRA MASTERS, Vice-Chair

By:_____
GARY COTTINO, Board Member

STATE OF NEVADA

GOVERNMENT EMPLOYEE-MANAGEMENT

RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 5046, Petitioner, v. ELKO COUNTY FIRE PROTECTION DISTRICT, Respondent.	Case No. 2019-011 **NOTICE OF ENTRY OF ORDER** **PANEL C** **ITEM NO. 847-A**

TO: Complainant and their attorneys, Thomas Donaldson, Esq. and Dyer Lawrence LLP;

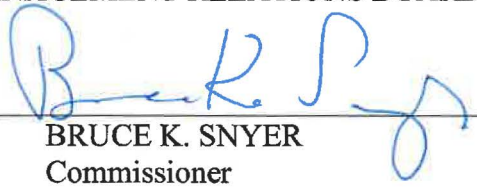
TO: Respondent and their attorneys, S. Jordan Walsh, Esq. and Holland & Hart LLP.

PLEASE TAKE NOTICE that an **ORDER** was entered in the above-entitled matter on July 8, 2020.

A copy of said order is attached hereto.

DATED this 8th day of July 2020.

GOVERNMENT EMPLOYEE-
MANAGEMENT RELATIONS BOARD

BY 

BRUCE K. SNYER
Commissioner

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Local Government Employee-Management Relations Board, and that on the 8th day of July 2020, I served a copy of the foregoing **NOTICE OF ENTRY OF ORDER** by mailing a copy thereof, postage prepaid to:

Thomas Donaldson, Esq.
Dyer Lawrence, LLP
2805 Mountain Street
Carson City, NV 89073

S. Jordan Walsh, Esq.
Holland & Hart LLP
5441 Kietzke Lane, Suite 200
Reno, NV 89511-2094

BRUCE K. SNYDER
Commissioner